

## HB0192S01 compared with HB0192

~~deleted text~~ shows text that was in HB0192 but was deleted in HB0192S01.

inserted text shows text that was not in HB0192 but was inserted into HB0192S01.

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**Representative Marsha Judkins proposes the following substitute bill:**

### FORMER OFFENDER EMPLOYMENT AMENDMENTS

2022 GENERAL SESSION

STATE OF UTAH

**Chief Sponsor: Marsha Judkins**

Senate Sponsor: \_\_\_\_\_

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#### LONG TITLE

##### General Description:

This bill addresses employment and licensing of a former offender as a mental health professional.

##### Highlighted Provisions:

This bill:

- ▶ creates and modifies definitions;
- ▶ when hiring a mental health professional, prohibits a public or private employer from:
  - considering certain arrests or criminal convictions;
  - denying employment based on certain criminal convictions; and
  - denying certain employment based on the mental health professional's participation in substance use treatment;

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- ▶ prohibits the Division of Occupational and Professional Licensing from:
  - considering certain criminal convictions when taking certain actions regarding a mental health professional's license; and
  - refusing certain mental health professionals' licenses based on participation in substance use treatment; and
- ▶ makes technical and conforming changes.

### Money Appropriated in this Bill:

None

### Other Special Clauses:

None

### Utah Code Sections Affected:

#### AMENDS:

**34-52-102**, as last amended by Laws of Utah 2019, Chapter 371

**34-52-201**, as last amended by Laws of Utah 2019, Chapters 371 and 479

**58-1-401**, as last amended by Laws of Utah 2021, Chapter 404

**58-1-501**, as last amended by Laws of Utah 2020, Chapters 289 and 339

**58-60-108**, as last amended by Laws of Utah 2021, Chapter 404

**58-60-110**, as last amended by Laws of Utah 2019, Chapter 419

#### ENACTS:

**34-52-302**, Utah Code Annotated 1953

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*Be it enacted by the Legislature of the state of Utah:*

Section 1. Section **34-52-102** is amended to read:

#### **34-52-102. Definitions.**

As used in this chapter:

(1) "Applicant" means an individual who provides information to a public employer or private employer for the purpose of obtaining employment.

(2) (a) "Criminal conviction" means a verdict or finding of guilt after a criminal trial or a plea of guilty or nolo contendere to a criminal charge.

(b) "Criminal conviction" does not include an expunged criminal conviction.

(3) "Juvenile adjudication" means:

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(a) a finding by a court that the facts in a petition or criminal information alleging an individual committed an offense when the individual was younger than 18 years old have been proved; or

(b) an admission or plea of no contest under Section 80-6-306.

(4) "Mental health professional applicant" means an individual who:

(a) is licensed under Title 58, Chapter 60, Mental Health Professional Practice Act; and

(b) provides information to a public employer or private employer for the purpose of obtaining employment that requires a license under Title 58, Chapter 60, Mental Health Professional Practice Act.

~~[(3)]~~ (5) (a) "Private employer" means a person who has one or more employees employed in the same business, or in or about the same establishment, under any contract of hire, express or implied, oral or written.

(b) "Private employer" does not include a public employer.

~~[(4)]~~ (6) "Public employer" means an employer that is:

(a) the state or any administrative subunit of the state, including a department, division, board, council, committee, institution, office, bureau, or other similar administrative unit of state government;

(b) a state institution of higher education; or

(c) a municipal corporation, county, municipality, school district, local district, special service district, or other political subdivision of the state.

Section 2. Section **34-52-201** is amended to read:

**34-52-201. Public employer requirements -- Exceptions for hiring a mental health professional.**

(1) ~~[A]~~ Except as provided in Subsections (3) and (6), a public employer may not:

(a) exclude an applicant from an initial interview because of a past criminal conviction[-], or, if the applicant is a mental health professional applicant, because of a past juvenile adjudication or an arrest that occurred when the mental health professional applicant was younger than 18 years old;

(b) make an inquiry related to an applicant's expunged criminal history;

(c) when making a hiring decision regarding a mental health professional applicant, consider:

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- (i) an arrest described in Subsection (1)(a);
  - (ii) an arrest not followed by a criminal conviction or juvenile adjudication;
  - (iii) a juvenile adjudication;
  - (iv) a past criminal conviction ~~{for which the mental health professional applicant's incarceration ended more than three years before the day on which the mental health professional applies for employment with the public employer; or~~
    - ~~—— (v) a past criminal conviction for which}~~ if the mental health professional applicant was not incarcerated ~~{that occurred more than three years before}~~ for the ~~{day on which}~~ criminal conviction and the mental health professional applicant's sentence for the criminal conviction terminates; or
    - (v) a past criminal conviction if the mental health professional applicant ~~{applies for employment with the public employer}~~ was incarcerated for the criminal conviction and at least three years have passed since the later of:
      - (A) the day on which the incarceration for the criminal conviction terminates; or
      - (B) the day on which the incarceration for a supervision violation related to the criminal conviction terminates; or
  - (d) deny a mental health professional applicant employment based on a past criminal conviction that does not bear a direct relationship to the mental health professional applicant's ability to safely or competently perform the duties of employment.
- (2) A public employer excludes an applicant from an initial interview under Subsection (1)(a) if the public employer:
- (a) requires an applicant to disclose, on an employment application, a criminal conviction, or, if the applicant is a mental health professional applicant, a juvenile adjudication or an arrest described in Subsection (1)(a);
  - (b) requires an applicant to disclose, before an initial interview, a criminal conviction, or, if the applicant is a mental health professional applicant, a juvenile adjudication or an arrest described in Subsection (1)(a); or
  - (c) if no interview is conducted, requires an applicant to disclose, before making a conditional offer of employment, a criminal conviction[-], or, if the applicant is a mental health professional, a juvenile adjudication or an arrest described in Subsection (1)(a).
- (3) Notwithstanding Subsection (1)(d), a public employer may not deny a mental health

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professional applicant employment that requires the mental health professional applicant to provide substance use treatment based on:

(a) the mental health professional applicant's participation in substance use treatment;

(b) a past criminal conviction for a nonviolent drug offense ~~{for which}~~ if the mental health professional applicant was not incarcerated for the criminal conviction and the mental health professional applicant's ~~{incarceration ended more than three years before the day on which the mental health professional applies for employment with the public employer}~~ sentence for the criminal conviction terminates; or

(c) a past criminal conviction for a nonviolent drug offense ~~{for which}~~ if the mental health professional applicant was ~~{not}~~ incarcerated ~~{that occurred more than three years before}~~ for the criminal conviction and at least three years have passed since the later of:

(i) the day on which the ~~{mental health professional applicant applies for employment with the public employer}~~ incarceration for the criminal conviction terminates; or

(ii) the day on which the incarceration for a supervision violation related to the criminal conviction terminates.

~~[(3)(a) A public employer may not make any inquiry related to an applicant's expunged criminal history.]~~

~~[(b)]~~ (4) An applicant seeking employment from a public employer may answer a question related to an expunged criminal record as though the action underlying the expunged criminal record never occurred.

~~[(4) Subject to]~~ (5) Except as provided in Subsections (1) through (3), [nothing in this section prevents] this section does not prevent a public employer from:

(a) asking an applicant for information about an applicant's criminal conviction history during an initial interview or after an initial interview; or

(b) considering an applicant's criminal conviction history when making a hiring decision.

~~[(5)]~~ (6) (a) Subsections (1) through ~~[(3)]~~ (4) do not apply:

~~[(a)]~~ (i) if federal, state, or local law, including corresponding administrative rules, requires the consideration of an applicant's criminal conviction history;

~~[(b)]~~ (ii) to a public employer that is a law enforcement agency;

~~[(c)]~~ (iii) to a public employer that is part of the criminal or juvenile justice system;

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~~[(d)]~~ (iv) to a public employer seeking a nonemployee volunteer;

~~[(e)]~~ (v) to a public employer that works with children or vulnerable adults;

~~[(f)]~~ (vi) to the Department of Alcoholic Beverage Control created in Section 32B-2-203;

~~[(g)]~~ (vii) to the State Tax Commission;

~~[(h)]~~ (viii) to a public employer whose primary purpose is performing financial or fiduciary functions; ~~[and]~~ or

~~[(i)]~~ (ix) to a public transit district hiring or promoting an individual for a safety sensitive position described in Section 17B-2a-825.

(b) Subsections (1)(c)(iv), (1)(c)(v), and (1)(d) do not apply to a criminal conviction for:

(i) a violent felony as defined in Section 76-3-203.5; or

(ii) a felony related to a criminal sexual act under Title 76, Chapter 5, Part 4, Sexual Offenses, or Title 76, Chapter 5b, Sexual Exploitation Act.

Section 3. Section **34-52-302** is enacted to read:

**34-52-302. Private employer requirements when hiring a mental health professional.**

(1) Except as provided in Subsections (3) and (5), a private employer may not:

(a) exclude a mental health professional applicant from an initial interview because of a past criminal conviction, juvenile adjudication, or an arrest that occurred when the mental health professional applicant was younger than 18 years old;

(b) make an inquiry related to a mental health professional applicant's expunged criminal history;

(c) when making a hiring decision regarding a mental health professional applicant, consider:

(i) an arrest described in Subsection (1)(a);

(ii) an arrest not followed by a criminal conviction or juvenile adjudication;

(iii) a juvenile adjudication;

(iv) a past criminal conviction ~~for which the mental health professional applicant's incarceration ended more than three years before the day on which the mental health professional applies for employment with the private employer; or~~

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~~(v) a past criminal conviction for which~~ if the mental health professional applicant was not incarcerated ~~{that occurred more than three years before}~~ for the ~~{day on which}~~ criminal conviction and the mental health professional applicant's sentence for the criminal conviction terminates; or

(v) a past criminal conviction if the mental health professional applicant ~~{applies for employment with the private employer}~~ was incarcerated for the criminal conviction and at least three years have passed since the later of:

(A) the day on which the incarceration for the criminal conviction terminates; or

(B) the day on which the incarceration for a supervision violation related to the criminal conviction terminates; or

(d) deny a mental health professional applicant employment based on a past criminal conviction that does not bear a direct relationship to the mental health professional applicant's ability to safely or competently perform the employment requirements.

(2) A private employer excludes a mental health professional applicant from an initial interview under Subsection (1)(a) if the private employer:

(a) requires the mental health professional applicant to disclose, on an employment application, a criminal conviction, a juvenile adjudication, or an arrest described in Subsection (1)(a);

(b) requires the mental health professional applicant to disclose, before an initial interview, a criminal conviction, a juvenile adjudication, or an arrest described in Subsection (1)(a); or

(c) if no interview is conducted, requires the mental health professional applicant to disclose, before making a conditional offer of employment, a criminal conviction, a juvenile adjudication, or an arrest described in Subsection (1)(a).

(3) Notwithstanding Subsection (1)(d), a private employer may not deny a mental health professional applicant employment that requires the mental health professional applicant to provide substance use treatment based on:

(a) the mental health professional applicant's participation in substance use treatment; ~~or~~

(b) a past criminal conviction for a nonviolent drug offense ~~{for which}~~ if the mental health professional applicant was not incarcerated for the criminal conviction and the mental

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health professional applicant's ~~{incarceration ended more than three years before the day on which the mental health professional applies for employment with the private employer}~~ ~~sentence for the criminal conviction terminates~~; or

(c) a past criminal conviction for a nonviolent drug offense ~~{for which}~~ if the mental health professional applicant was ~~{not}~~ incarcerated ~~{that occurred more than three years before}~~ ~~for the criminal conviction and at least three years have passed since the later of:~~

(A) the day on which the ~~{mental health professional applicant applies for employment with the private employer.~~

~~{incarceration for the criminal conviction terminates; or~~

(B) the day on which the incarceration for a supervision violation related to the criminal conviction terminates.

(4) Except as provided in Subsections (1) through (3), this section does not prevent a private employer from:

(a) asking a mental health professional applicant for information about the mental health professional applicant's criminal conviction history during an initial interview or after an initial interview; or

(b) considering a mental health professional applicant's criminal conviction history when making a hiring decision.

(5) (a) Subsections (1) through (3) do not apply:

(i) if federal, state, or local law, including corresponding administrative rules, requires the consideration of an applicant's criminal conviction history;

(ii) to a private employer that is part of the criminal or juvenile justice system;

(iii) to a private employer seeking a nonemployee volunteer;

(iv) to a private employer that works with children or vulnerable adults; or

(v) to a private employer whose primary purpose is performing financial or fiduciary functions.

(b) Subsections (1)(c)(iv), (1)(c)(v), and (1)(d) do not apply to a criminal conviction for:

(i) a violent felony as defined in Section 76-3-203.5; or

(ii) a felony related to a criminal sexual act under Title 76, Chapter 5, Part 4, Sexual Offenses, or Title 76, Chapter 5b, Sexual Exploitation Act.



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Section 4. Section **58-1-401** is amended to read:

### **58-1-401. Grounds for denial of license -- Disciplinary proceedings -- Time limitations -- Sanctions.**

(1) The division shall refuse to issue a license to an applicant and shall refuse to renew or shall revoke, suspend, restrict, place on probation, or otherwise act upon the license of a licensee who does not meet the qualifications for licensure under this title.

(2) The division may refuse to issue a license to an applicant and may refuse to renew or may revoke, suspend, restrict, place on probation, issue a public reprimand to, or otherwise act upon the license of a licensee for the following reasons:

(a) subject to ~~[the provisions of]~~ Subsection (7), the applicant or licensee has engaged in unprofessional conduct, as defined by statute or rule under this title;

(b) the applicant or licensee has engaged in unlawful conduct as defined by statute under this title;

(c) the applicant or licensee has been determined to be mentally incompetent by a court of competent jurisdiction; or

(d) subject to Subsections 58-31b-401(7), 58-60-108(2), 58-61-401(2), 58-67-401(2), 58-68-401(2), 58-70a-401(2), and Section 58-81-105, the applicant or licensee is unable to practice the occupation or profession with reasonable skill and safety because of illness, drunkenness, excessive use of drugs, narcotics, chemicals, or other type of material, or as a result of a mental or physical condition, when the condition demonstrates a threat or potential threat to the public health, safety, or welfare.

(3) A licensee whose license to practice an occupation or profession regulated by this title has been suspended, revoked, placed on probation, or restricted may apply for reinstatement of the license at reasonable intervals and upon compliance with conditions imposed upon the licensee by statute, rule, or terms of the license suspension, revocation, probation, or restriction.

(4) The division may issue cease and desist orders to:

(a) a licensee or applicant who may be disciplined under Subsection (1) or (2);

(b) a person who engages in or represents that the person is engaged in an occupation or profession regulated under this title; and

(c) a person who otherwise violates this title or a rule adopted under this title.

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(5) The division may impose an administrative penalty in accordance with Section 58-1-502.

(6) (a) The division may not take disciplinary action against a person for unprofessional or unlawful conduct under this title, unless the division enters into a stipulated agreement or initiates an adjudicative proceeding regarding the conduct within four years after the conduct is reported to the division, except under Subsection (6)(b).

(b) (i) The division may not take disciplinary action against a person for unprofessional or unlawful conduct more than 10 years after the occurrence of the conduct, unless the proceeding is in response to a civil or criminal judgment or settlement and the proceeding is initiated within one year following the judgment or settlement.

(ii) Notwithstanding Subsection (6)(b)(i), the division may refuse to issue a license due to unprofessional or unlawful conduct that occurred more than 10 years before a request or application for licensure is made.

(7) When the division is determining whether to refuse to issue a license to an applicant, or to refuse to renew the license of a licensee, based solely on the criminal conviction of an applicant or licensee, the division shall:

(a) provide individualized consideration to the applicant or licensee;

(b) except as provided in Subsection 58-60-108(2), determine whether the criminal conviction bears a substantial relationship to the applicant's or licensee's ability to safely or competently practice the occupation or profession; and

(c) consider the applicant's or licensee's current circumstances, which may include any of the following:

(i) the age of the applicant or licensee when the applicant or licensee committed the offense;

(ii) the time that has elapsed since the applicant or licensee committed the offense;

(iii) whether the applicant or licensee has completed the applicant's or licensee's criminal sentence;

(iv) whether the applicant has completed or is actively participating in rehabilitative drug or alcohol treatment;

(v) any testimonials or recommendations from other individuals provided by the applicant or licensee, including a progress report from the applicant's or licensee's probation or

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parole officer;

- (vi) other evidence of rehabilitation provided by the applicant or licensee;
- (vii) the education and training of the applicant or licensee;
- (viii) the employment history of the applicant or licensee; and
- (ix) other relevant information provided by the applicant or licensee.

Section 5. Section **58-1-501** is amended to read:

### **58-1-501. Unlawful and unprofessional conduct.**

(1) "Unlawful conduct" means conduct, by any person, that is defined as unlawful under this title and includes:

(a) practicing or engaging in, representing oneself to be practicing or engaging in, or attempting to practice or engage in any occupation or profession requiring licensure under this title if the person is:

- (i) not licensed to do so or not exempted from licensure under this title; or
- (ii) restricted from doing so by a suspended, revoked, restricted, temporary,

probationary, or inactive license;

(b) (i) impersonating another licensee or practicing an occupation or profession under a false or assumed name, except as permitted by law; or

(ii) for a licensee who has had a license under this title reinstated following disciplinary action, practicing the same occupation or profession using a different name than the name used before the disciplinary action, except as permitted by law and after notice to, and approval by, the division;

(c) knowingly employing any other person to practice or engage in or attempt to practice or engage in any occupation or profession licensed under this title if the employee is not licensed to do so under this title;

(d) knowingly permitting the person's authority to practice or engage in any occupation or profession licensed under this title to be used by another, except as permitted by law;

(e) obtaining a passing score on a licensure examination, applying for or obtaining a license, or otherwise dealing with the division or a licensing board through the use of fraud, forgery, or intentional deception, misrepresentation, misstatement, or omission;

(f) (i) issuing, or aiding and abetting in the issuance of, an order or prescription for a drug or device to a person located in this state:

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(A) without prescriptive authority conferred by a license issued under this title, or by an exemption to licensure under this title; or

(B) with prescriptive authority conferred by an exception issued under this title or a multistate practice privilege recognized under this title, if the prescription was issued without first obtaining information, in the usual course of professional practice, that is sufficient to establish a diagnosis, to identify underlying conditions, and to identify contraindications to the proposed treatment; and

(ii) Subsection (1)(f)(i) does not apply to treatment rendered in an emergency, on-call or cross coverage situation, provided that the person who issues the prescription has prescriptive authority conferred by a license under this title, or is exempt from licensure under this title; or

(g) aiding or abetting any other person to violate any statute, rule, or order regulating an occupation or profession under this title.

(2) "Unprofessional conduct" means conduct, by a licensee or applicant, that is defined as unprofessional conduct under this title or under any rule adopted under this title and includes:

(a) violating any statute, rule, or order regulating an occupation or profession under this title;

(b) violating, or aiding or abetting any other person to violate, any generally accepted professional or ethical standard applicable to an occupation or profession regulated under this title;

(c) subject to ~~[the provisions of Subsection (4);]~~ Subsections (4) and 58-60-110(4), engaging in conduct that results in conviction, a plea of nolo contendere, or a plea of guilty or nolo contendere that is held in abeyance pending the successful completion of probation with respect to a crime of moral turpitude or any other crime that, when considered with the functions and duties of the occupation or profession for which the license was issued or is to be issued, bears a substantial relationship to the licensee's or applicant's ability to safely or competently practice the occupation or profession;

(d) engaging in conduct that results in disciplinary action, including reprimand, censure, diversion, probation, suspension, or revocation, by any other licensing or regulatory authority having jurisdiction over the licensee or applicant in the same occupation or profession

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if the conduct would, in this state, constitute grounds for denial of licensure or disciplinary proceedings under Section 58-1-401;

(e) engaging in conduct, including the use of intoxicants, drugs, narcotics, or similar chemicals, to the extent that the conduct does, or might reasonably be considered to, impair the ability of the licensee or applicant to safely engage in the occupation or profession;

(f) practicing or attempting to practice an occupation or profession regulated under this title despite being physically or mentally unfit to do so;

(g) practicing or attempting to practice an occupation or profession regulated under this title through gross incompetence, gross negligence, or a pattern of incompetency or negligence;

(h) practicing or attempting to practice an occupation or profession requiring licensure under this title by any form of action or communication which is false, misleading, deceptive, or fraudulent;

(i) practicing or attempting to practice an occupation or profession regulated under this title beyond the scope of the licensee's competency, abilities, or education;

(j) practicing or attempting to practice an occupation or profession regulated under this title beyond the scope of the licensee's license;

(k) verbally, physically, mentally, or sexually abusing or exploiting any person through conduct connected with the licensee's practice under this title or otherwise facilitated by the licensee's license;

(l) acting as a supervisor without meeting the qualification requirements for that position that are defined by statute or rule;

(m) issuing, or aiding and abetting in the issuance of, an order or prescription for a drug or device:

(i) without first obtaining information in the usual course of professional practice, that is sufficient to establish a diagnosis, to identify conditions, and to identify contraindications to the proposed treatment; or

(ii) with prescriptive authority conferred by an exception issued under this title, or a multi-state practice privilege recognized under this title, if the prescription was issued without first obtaining information, in the usual course of professional practice, that is sufficient to establish a diagnosis, to identify underlying conditions, and to identify contraindications to the proposed treatment;

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- (n) violating a provision of Section 58-1-501.5; or
- (o) violating the terms of an order governing a license.

(3) Unless otherwise specified by statute or administrative rule, in a civil or administrative proceeding commenced by the division under this title, a person subject to any of the unlawful and unprofessional conduct provisions of this title is strictly liable for each violation.

(4) The following are not evidence of engaging in unprofessional conduct under Subsection (2)(c):

- (a) an arrest not followed by a conviction; or
- (b) a conviction for which an individual's incarceration has ended more than seven years before the date of the division's consideration, unless:
  - (i) after the incarceration the individual has engaged in additional conduct that results in another conviction, a plea of nolo contendere, or a plea of guilty or nolo contendere that is held in abeyance pending the successful completion of probation; or
  - (ii) the conviction was for:
    - (A) a violent felony as defined in Section 76-3-203.5;
    - (B) a felony related to a criminal sexual act [~~pursuant to~~] under Title 76, Chapter 5, Part 4, Sexual Offenses, or Title 76, Chapter 5b, Sexual Exploitation Act; or
    - (C) a felony related to criminal fraud or embezzlement, including a felony [~~pursuant to~~] under Title 76, Chapter 6, Part 5, Fraud, or Title 76, Chapter 6, Part 4, Theft.

Section 6. Section **58-60-108** is amended to read:

### **58-60-108. Grounds for action regarding license -- Disciplinary proceedings.**

(1) Subject to Subsection (2), the division's grounds for refusing to issue a license to an applicant, for refusing to renew the license of a licensee, for revoking, suspending, restricting, or placing on probation the license of a licensee, for issuing a public or private reprimand to a licensee, and for issuing a cease and desist order are under Section 58-1-401.

(2) The division may not:

(a) refuse, revoke, suspend, or in any way restrict an [~~applicant~~] applicant's or licensee's license under this chapter solely because the applicant or licensee seeks or participates in mental health or substance abuse treatment[-];

(b) refuse an applicant's license under Part 5, Substance Use Disorder Counselor Act,

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because the applicant was convicted of a nonviolent drug offense if:

(i) the applicant's incarceration for the offense ended more than three years before the day on which the applicant sought licensure under Part 5, Substance Use Disorder Counselor Act; or

(ii) in the case the applicant was not incarcerated for the offense, the conviction occurred more than three years before the day on which the applicant sought licensure under Part 5, Substance Use Disorder Counselor Act.

Section 7. Section **58-60-110** is amended to read:

### **58-60-110. Unprofessional conduct.**

(1) As used in this chapter, "unprofessional conduct" includes:

(a) using or employing the services of any individual to assist a licensee in any manner not in accordance with the generally recognized practices, standards, or ethics of the profession for which the individual is licensed, or the laws of the state;

(b) failure to confine practice conduct to those acts or practices:

(i) in which the individual is competent by education, training, and experience within limits of education, training, and experience; and

(ii) which are within applicable scope of practice laws of this chapter;

(c) disclosing or refusing to disclose any confidential communication under Section 58-60-114 or 58-60-509; and

(d) a pattern of failing to offer a patient the opportunity to waive the patient's privacy rights under the Standards for Privacy of Individually Identifiable Health Information, 45 C.F.R., Parts 160 and 164.

(2) "Unprofessional conduct" under this chapter may be further defined by division rule.

(3) Notwithstanding Section 58-1-401, the division may not act upon the license of a licensee for unprofessional conduct under Subsection (1)(d).

(4) (a) Except as provided in Subsection (4)(b), the following are not evidence of engaging in unprofessional conduct under Subsection 58-1-501(2)(c):

(i) a conviction for which an applicant's incarceration ended more than three years before the date of the division's consideration; or

(ii) a conviction for which the applicant was not incarcerated that occurred more than

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three years before the date of the division's consideration.

(b) Subsection (4)(a) does not apply to a conviction described in Subsection 58-1-501(4)(b)(ii).